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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC. and
TURNER BROADCASTING SYSTEM, INC.,

Petitioners,

—against—

MANUEL ANTONIO NORIEGA

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NEW YORK TIMES COMPANY, DOW JONES & COMPANY, INC., GANNETT CO., INC., KNIGHT-RIDDER, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE TIME INC. MAGAZINE COMPANY, THE TIMES MIRROR COMPANY, TRIBUNE COMPANY, THE WASHINGTON POST COMPANY AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONERS

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This brief is submitted on behalf of The New York Times Company, Dow Jones & Company, Inc., Gannett Co., Inc.,

Knight-Ridder, Inc., The Miami Herald Publishing Company, The Time Inc. Magazine Company, The Times Mirror Company, Tribune Company, The Washington Post Company, and the American Newspaper Publishers Association, Inc., as *amici curiae*.

INTERESTS OF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, *amici* have obtained and file herewith the written consent of all parties to this action to the submission of this brief.

Amici are major publishing companies and an association of newspaper publishers. The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation of 1.15 million daily and over 1.7 million on Sunday. The Company also owns five television stations, two radio stations, 32 regional newspapers and 17 national magazines.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, the Dow Jones News Services and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

Gannett Co., Inc. is a nationwide news and information company that publishes 82 daily newspapers (including *USA Today*), a variety of non-daily publications (including *USA Weekend*, a newspaper magazine) and operates 10 television stations, 15 radio stations, Gannett News Services and the largest outdoor advertising company in North America.

Knight-Ridder, Inc. is an international information and communications company engaged in newspaper publishing, business news and information services, news, graphics and photo services, cable television and newsprint manufacturing. The Miami Herald Publishing Company is a division of Knight-Ridder, Inc. It publishes *The Miami Herald* and *El*

Nuevo Herald, which are circulated generally throughout the State of Florida. Knight-Ridder also publishes 28 other daily newspapers including *The Philadelphia Inquirer*, the *San Jose Mercury News* and the *Detroit Free Press*.

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money* and *Life*. (The Time Inc. Magazine Company is a wholly owned subsidiary of Time Warner Inc., which directly or indirectly owns approximately 18% of Turner Broadcasting System, Inc.)

The Times Mirror Company is a diversified communications company with cable, broadcasting, publishing, and newspaper properties, including the *Los Angeles Times*, *Newsday* and *New York Newsday*, the *Baltimore Sun*, the *Hartford Courant*, and the *Morning Call* of Allentown, Pennsylvania.

Tribune Company is the nation's fifth largest newspaper publisher and its fourth largest television broadcaster. The company's daily newspapers include *Chicago Tribune*, the New York *Daily News*, *The Orlando Sentinel*, the Fort Lauderdale *Sun-Sentinel*, the *Daily Press* and *The Times-Herald* of Newport News, Virginia, and the *Times Tribune* of Palo Alto and *Times Advocate* of Escondido, California. The six Tribune television stations are WPIX in New York, KTLA in Los Angeles, WGN-TV in Chicago, WGNX in Atlanta, KWGN in Denver and WGNO in New Orleans.

The Washington Post Company is a diversified communications company which owns, *inter alia*, *The Washington Post*, a newspaper published in the Washington, D.C. area with a daily circulation of 885,000 and a Sunday circulation of 1,189,000 and *Newsweek* magazine, a weekly international newsmagazine with a United States readership in excess of 19 million.

The American Newspaper Publishers Association (ANPA) is a national trade association representing about 1,400 news-

papers throughout the United States. ANPA membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States.

Amici share a common interest in preserving and exercising their First Amendment rights and a common concern that the decision of the Court of Appeals below would imperil those rights. *Amici* believe that the ruling of the Court of Appeals in this case, together with a spate of recent decisions in the lower courts, have disturbed the heretofore uniform recognition that *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), stands as an all but absolute bar to prior restraints on publication. *Amici* have particular concern flowing from the decisions below that failure to insist on application of the *Nebraska Press* standards may lead to relatively routine use of prior restraints as an "easy" way of responding to perceived threats to fair trial rights.

The Petition raises important issues of law under the First Amendment with respect to the circumstances under which a publisher or broadcaster may be enjoined even temporarily from publishing newsworthy information. This is an issue of critical significance to *amici*, as they routinely operate under severe deadline pressures and strive to publish or broadcast news in a timely fashion.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Petition and set forth below only the facts and procedural history which bear upon the Reasons for Granting the Writ submitted by *amici*.

This case concerns audiotapes of conversations between General Manuel A. Noriega, the former Panamanian leader and a criminal defendant incarcerated in federal prison, and various individuals, including persons asserted to be employed by General Noriega's counsel. Audiotapes of telephone conversations by prisoners are routinely prepared by

the United States Bureau of Prisons. Prisoners are informed of such taping. The team of prosecutors involved in the underlying criminal case denies involvement in the taping of General Noriega and knowledge of the contents of the audiotapes.

Petitioners ("CNN") obtained copies of a number of audiotapes of General Noriega made while he was incarcerated. CNN sought the views of representatives of the United States, the defense, and academic legal experts as to the propriety of such taping. General Noriega's counsel reviewed the tapes and appeared in an on-camera interview to discuss them. After CNN had broadcast that interview, along with a portion of one of the audiotapes, General Noriega's counsel moved to restrain further broadcasts.

Noriega's motion was heard on November 8, 1990 in the United States District Court for the Southern District of Florida, where the criminal case was pending. At the conclusion of that hearing, the District Court issued an order enjoining CNN from broadcasting the tapes containing privileged attorney-client conversations pending their review by the court and ordering CNN to produce copies of the tapes. The District Court, after acknowledging that the test set out in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), was controlling, concluded that application of the test was "impossible" pending review (by a magistrate) of the tapes. Appendix to the Petition ("App.") 22a. In a supplemental order issued the next day, after CNN had declined to produce its tapes, the District Court again noted the asserted impossibility of applying the *Nebraska Press* test without reviewing the tapes: "the court was in effect being asked to make a factual determination without being allowed to review the facts." App. 25a. The court viewed it as "fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court" and, while acknowledging that "no clear and immediate harm is apparent," the court dismissed the significance of this because CNN "had prevented [the] court" from reviewing the tapes. *Id.*

CNN filed a notice of appeal and emergency motions for reversal and stay with the United States Court of Appeals for the Eleventh Circuit on November 8, 1990. Supplemental briefs were filed by CNN the next day and the Court of Appeals then directed General Noriega and the United States to file briefs.[1] On November 10, 1990 the Court of Appeals, treating CNN's emergency motion as a petition for a writ of mandamus, denied the petition. The appeals court adverted to *Nebraska Press* only in passing, and to the larger body of law established by this Court all but totally barring prior restraints not at all. The court looked instead to cases involving press access to trial proceedings, including *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986). These cases do not involve prior restraints on publication of materials already in the possession of the press, but instead deal with the quite different questions involved in determining whether the press may be denied access to proceedings and documents. The court also placed considerable emphasis on the potentially privileged nature of the taped Noriega conversations without explaining the significance of the privilege to the prior restraint issue (as opposed to possible governmental misconduct). App. 13a-15a. The Court of Appeals, like the District Court, did not determine that the prerequisites to *Nebraska Press* had been satisfied. The appeals court concluded that the District Court could "conduct the difficult balancing of constitutional rights" involved here only after review of the tapes. App. 16a.

CNN then filed with this Court its Petition for Certiorari and its emergency motion for a stay.

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1 After initial briefs were filed, and well in advance of any ruling by the Eleventh Circuit, CNN broadcast a second report including a tape of a Noriega conversation. While defendant initially moved to hold CNN in contempt, that motion has now been stayed by defendant, with the court's consent, pending this Court's review, and CNN has agreed not to broadcast any additional tapes containing attorney-client material pending this Court's consideration of this matter. (Transcript of Proceedings, Nov. 12, 1990)

SUMMARY OF ARGUMENT

Not once in its history has this Court affirmed the issuance of a prior restraint on the publication or broadcast of news. Not once—until this case—since this Court's decision in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), has any federal appellate court affirmed the issuance of a prior restraint on the publication or broadcast of news on any ground, let alone for fear that such publication or broadcast might imperil a criminal defendant's right to a fair trial. The very uniformity of the judgments in such matters bore out the correctness of this Court's observation that the record before it in *Nebraska Press* (one that led it to strike down the prior restraint in that case) was "illustrative rather than exceptional" and that the Court's action reflected the "heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." 427 U.S. at 569. Indeed, the pattern reflecting a "recurring result . . . in case after case" following this Court's decision in *Nebraska Press* was the very sort that Justice White predicted might eventually suggest the adoption of a "more general rule" flatly barring prior restraints on this ground. *Nebraska Press*, *supra*, 427 U.S. at 570-71 (White, J., concurring).

Within the past year, however, the pattern of near-uniform judicial rejection of prior restraints has been broken by a series of lower court decisions imposing prior restraints. The present case, the only one of the group to survive intermediate appellate review, is in many respects reflective of the route by which prior restraints have been justified in the face of this Court's holding in *Nebraska Press*. The opinions below simply do not explain why the threat to General Noriega's rights can possibly be viewed as any more severe than those dealt with successfully in scores of other high visibility cases, including some in which reams of immunized testimony had to be kept from tainting prosecutors and the jury, or why the protective procedures endorsed in such cases would not suffice here. Such showings are required by this Court's decision in *Nebraska Press*. The result reached below

was, quite clearly, wrong; more importantly, however, unless reviewed by this Court, it threatens to make the prior restraint once again an acceptable judicial tool, to be used too easily by trial judges "to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal." 427 U.S. at 608 (Brennan, J., concurring). But the First Amendment stands as a bar to this judicial short-cut.

It is submitted that sufficient experience in the application of *Nebraska Press* now exists to consider the "general rule" adverted to but not then endorsed by Justice White (*see also* Stevens, J., concurring in *Nebraska Press*, 427 U.S. at 617). The adoption of such a rule would avoid the necessarily hurried consideration of issues of constitutional moment inherent in evaluations of a prior restraint, consideration which ought to lead uniformly to rejection of restraints premised on the interests at stake here since such interests are adequately served by other measures available to the judiciary.

REASONS FOR GRANTING THE WRIT

The Court Below Has Departed From This Court's Holdings

The judicial orders at issue on this petition are prior restraints, "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, *supra*, 427 U.S. at 559. As the Court, in an opinion of Justice Holmes, has long recognized, "the main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.' " *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (emphasis in the original). *And see New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). So consistent are the authorities to the effect that, in Professor Alexander Bickel's words, "[p]rior restraints fall on speech with a brutality and a finality all their own" and that "it is the

hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech",[2] that prior restraints with respect to news reporting about judicial proceedings were viewed as all but absolutely forbidden even prior to this Court's decision striking down such a restraint in *Nebraska Press*.

In that decision the Court held that even reporting as to a confession of a number of brutal murders and sexual assaults in a small Nebraska town should not be restrained. It noted the important role the press plays in reporting on the system of justice and its role in

> " 'guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.' *Sheppard* v. *Maxwell*, 384 U.S. at 350." 427 U.S. at 560.

It reaffirmed that " 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity.' *Carroll* v. *Princess Anne*, 393 U.S. 175, 181 (1968)." 427 U.S. at 558.

The Court gave effect to the "heavy presumption" in requiring that any proposed restraint premised on a vindication of a criminal defendant's constitutional rights be supported by a judicial determination (a) that *more* than a mere possibility that the threatened publicity "*could* impinge upon the defendant's right to a fair trial" existed, 427 U.S. at 563 (emphasis in the original); (b) that no "measures short of an order restraining all publication would have insured the defendant a fair trial," *id.*; and (c) that the restraint would effectively protect the defendant's rights.[3] *Id.* at 565. The Court determined that the prior restraint imposed there was defective in each respect.

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2 A.M. Bickel, *The Morality of Consent* 61 (1975).

3 Even the briefest delay in publication effected by judicial order is subjected to the scrutiny of the tests established in *Nebraska Press* notwithstanding that the order in question "does not prohibit but only

The Court's opinion emphasized that far from being "exceptional" the record before it was "illustrative" of the problems inherent in satisfying its test—and in justifying a prior restraint premised on the asserted need to protect a defendant's right to a fair trial. *Id.* at 569.

In a concurring opinion, Justice Brennan (writing for himself and Justices Stewart and Marshall) concluded that:

> "The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutory constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors." 427 U.S. at 572-73.

Justice Stevens declined to adopt the general rule urged by Justice Brennan "without further argument" on a variety of questions, but recognized that at the end of the day he too might well adopt Justice Brennan's "ultimate conclusion." 427 U.S. at 617. Justice White explicitly noted his views that the very reasons canvassed by the Court gave him "grave doubt" "whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570-71. He declined to go further in that case, at least in the absence of "a broader spectrum of cases presenting similar issues," but noted:

> "If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the inter-

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postpones publication." 427 U.S. at 560. And such tests apply even though the delay is sought only for a "temporary restraint [intended] solely to permit [the Government] to study and assess the impact" of the proposed publication. *Id.* at 559.

minable litigation that our failure to do so would necessarily entail." *Id.*

Amici submit that the "broader spectrum of cases," 427 U.S. at 571, presented to the lower courts in the 14 years since *Nebraska* has made clear both the accuracy of Justice White's belief that a "recurring result" might be discerned and, more recently, the danger inherent in the failure to adopt a general rule barring prior restraints premised on such basis.

In case after case the lower courts have recognized that even pervasive pretrial publicity is not a bar to empanelling an untainted jury and that available devices such as voir dire and change of venue have provided fully adequate protection even in cases involving the highest possible visibility. *See, e.g., In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989), summarizing the successful judicial use of *voir dire* to protect against unfair publicity in even the most notorious of cases. (The court dealt there with the trial of former PTL leader Rev. Jim Bakker and referred, *inter alia*, to the Watergate, Abscam and DeLorean prosecutions).[4]

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4 The Fourth Circuit noted the ability of courts to defuse pretrial publicity concerns:

> "Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which—remarkably in the eyes of many—were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity. See, e.g., *Columbia Broadcasting Systems, Inc.* v. *United States District Court*, 729 F.2d 1174, 1181 (9th Cir. 1983) (noting, in DeLorean case, evidence of rapid dissipation of pretrial publicity effects in large metropolitan areas); *In re National Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980) (noting in Abscam case that many prospective jurors do not follow news of highly publicized prosecutions closely); *United States* v. *Mitchell*, 551 F.2d 1252, 1262 n. 46 (D.C. Cir. 1976), (noting in John Mitchell case that ten of twelve jurors selected in Watergate trial 'claimed to have followed Watergate casually, if at all'), *rev'd on other grounds sub nom. Nixon* v. *Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Increasingly the courts are expressing

Indeed even where, as here, the allegedly prejudicial material consisted of tapes of defendant himself, courts have refused to find prior restraints to be necessary to protect a defendant's interest in a fair trial. *Columbia Broadcasting Systems, Inc.* v. *U.S. District Court*, 729 F.2d 1174 (9th Cir. 1983). Strikingly, despite the claims of enormous prejudicial publicity, a jury, subjected to vigorous voir dire, *acquitted* defendant John DeLorean in that case, despite the broadcast of the allegedly incriminating videotapes of the defendant. *See also Hunt* v. *National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989); *United States* v. *McKenzie*, 697 F.2d 1225 (5th Cir. 1983); *Goldblum* v. *National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978); *State* v. *Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984); *State ex rel. Miami Herald Publishing Co.* v. *McIntosh*, 340 So.2d 904 (Fla. 1977); *Des Moines Register and Tribune Co.* v. *Osmundson*, 248 N.W.2d 493 (Iowa 1976).

But this pattern has been broken within this past year. At least seven prior restraints have been entered within the last 11 months. Six of them are detailed in the margin. They affected publishers of small newspapers and trade newsletters, book publishers, television syndicators and a criminal

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confidence that *voir dire* can serve in almost all cases as a reliable protection against juror bias however induced. See, e.g., *Press-Enterprise II*, 478 U.S. at 15, 106 S.Ct. at 2743; *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539, 563-64, 96 S.Ct. 2791, 2804-05, 49 L.Ed.2d 683 (1976); *Seattle Times Co.* v. *United States District Court*, 845 F.2d 1513, 1517-18 (9th Cir. 1988); *United States* v. *Peters*, 754 F.2d 753, 762 (7th Cir. 1985); *In re National Broadcasting Co.*, 635 F.2d at 953." 882 F.2d at 855-56

See also United States v. *Poindexter*, 725 F.Supp. 13, 37 (D.D.C. 1989) (change of venue of trial of John Poindexter not warranted as "both in Watergate and the *North* case, it was found possible to assemble an impartial jury notwithstanding publicity that was far more widespread than in the instant case"); *United States* v. *North*, 713 F.Supp. 1444, 1444 (D.D.C. 1989) ("completely impartial jury can be seated" in trial of Oliver North).

defendant. Each restraint was in effect for some period of time but each was ultimately stayed or vacated.[5]

The seventh such restraint was that entered by the district court in this matter and left undisturbed by the Eleventh Circuit. Measured by the three standards set forth in the Court's opinion in *Nebraska Press*, the prior restraint here cannot be justified.

Thus, there is no basis to conclude that *any* disclosures of conversations between General Noriega and representatives of his lawyers would taint the jury in the trial process, let alone taint it in a fashion that could not be prevented by the "traditional" protections of jury voir dire or change of venue. Indeed, the District Court made no such finding.[6] Similarly,

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5 *In re Charlotte Observer*, No. 90-5912 (4th Cir. Nov. 6, 1990) (unpublished) (district court imposed prior restraint on publication of information divulged in open court; court of appeals vacated order); *United States* v. *Northrop Corp.*, 1990 WESTLAW 71352 (C.D. Cal. Feb. 15, 1990), *stayed*, No. 90-70081 (9th Cir. Feb. 16, 1990) (prohibition on television broadcast of institutional messages of corporate defendants entered to protect the right of the United States to a fair trial of criminal charges brought by it; stayed by the Ninth Circuit and mooted by subsequent guilty pleas); *Israel* v. *St. Martin's Press, Inc.*, 560 N.Y.S.2d 450 (1st Dep't 1990) (publication of book on the Israeli intelligence agency, Mossad, barred by the New York Supreme Court on the ground that it might endanger the lives of Israeli agents; order vacated by New York Appellate Division on the ground that the Israeli claims had not been proved and that the order was ineffective in light of prior distribution of book); *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) (district court granted injunction under 18 U.S.C. § 2511 against broadcast of tape of doctor made by reporter posing as a patient; Court of Appeals vacated); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir. 1990) (district court granted injunction against telecast on privacy grounds; Court of Appeals vacated); *Ernst & Young* v. *Bowman's Accounting Report*, No. 426/90-001 (Sup. Ct. N.Y. Co. Jan. 8, 1990), *vacated* (1st Dep't Jan. 18, 1990) (lower court granted injunction against reporter's disclosure of confidential business information; appellate court vacated on the ground that others had already published the data).

6 It would be particularly hard to find such prejudicial publicity to have been created by the tapes when the court has already declined to

if the concern were the possible taint of the prosecution team by attorney-client material, the recent Iran-Contra prosecutions demonstrate the ability of courts and prosecutors to deal with far larger volumes of "off limits" material (in that case immunized testimony) without denying defendants a fair trial. *United States* v. *North*, 910 F.2d 843 (D.C. Cir. 1990); *see also United States* v. *Byrd*, 765 F.2d 1524 (11th Cir. 1985); *United States* v. *Serrano*, 870 F.2d 1 (1st Cir. 1989). And whatever the legal significance of the taping of the conversations between defendant and counsel by the government in the first place, the courts have consistently declined to find that inadvertent exposure to privileged material (such as could result from the viewing of broadcast tapes) would, without more, constitute a *per se* violation of Sixth Amendment rights. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

Whether or not the original taping of General Noriega's conversations by the government constituted prosecutorial misconduct, CNN's reporting of that fact and its broadcast of tapes alleged to include attorney-client material is not an act entitling defendant to a prior restraint. If the court's concern is the government's original taping, the court can deal with that in the criminal case or General Noriega can maintain a subsequent civil action to vindicate his claim of *governmental* misconduct. *See Weatherford*, *supra*. If the concern is that CNN's broadcast will spread privileged material to previously untainted prosecutors—privileged material recorded by the government—then the court has a variety of devices to protect the prosecution from taint. In either case the problem is not one that need be addressed by imposing a prior restraint on CNN.[7]

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sever other defendants from joint trial with General Noriega despite allegations that co-defendants face the risk of prejudicial publicity in light of charges by President Bush that General Noriega is a " 'thug', a 'Narco-terrorist' and a 'poisoner of our children.' " *United States* v. *Noriega*, 1990 WESTLAW 156552, at 12 n.5 (S.D. Fla. Oct. 9, 1990).

7 In the opinions below, the attorney-client character of some of the materials seemed to take on a life of its own, one invested with talis-

The courts below seemed to view CNN's refusal to make available the tapes it had obtained as exempting the judiciary from having to make the findings required by *Nebraska Press*. App. 15a-16a, 22a, 24a-27a. Indeed, the opinions often read as though it were CNN's burden to prove that its broadcast will *not* result in prejudice. App. 22a. The District Court refers to the "unique nature of the problem facing this court" because it lacked knowledge of the content of the proposed publication. App. 27a. But the refusal to turn over material obtained by journalists and the resulting uncertainty as to the content of the material at issue on the motion for a prior restraint is nothing new in this context. Such refusals occurred in both *Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.), and *In re C.B.S., Inc.*, 570 F. Supp. 578 (E.D. La. 1983), *app. dismissed*, 735 F.2d 907 (5th Cir. 1984). In neither case did the court involved conclude that its obligation to give effect to the *Nebraska Press* standards required that the journalists make their materials available for pre-broadcast inspection. Yet that is precisely what the courts below demanded. And, when such material was not forthcoming, the court held that CNN had failed to discharge *its* supposed burden of showing that the material to be broadcast would *not* lead to prejudice to the defendant. But as Justice Brennan noted in *Nebraska Press*, the Constitution does not require that the discussion of

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manic significance. See opinion of Eleventh Circuit at 14-16. The privileged nature of a communication, of course, may be relevant both in assessing the extent of potential prejudice and in judging whether governmental misconduct was at issue. But it does not follow that the potential prejudice, if any, flowing from the disclosure of trial strategy leads to a *per se* violation of the Sixth Amendment (*see Weatherford, supra*) or would compromise that constitutional right any more than the disclosures of the confession in *Nebraska Press*.

Moreover, CNN is the exposer of the facts bearing on the alleged misconduct. It is performing the very oversight of the judicial process one expects of the press; it should hardly be barred from disclosing the facts bearing on such issues. It would be a bizarre rule of law if, in order to protect the government against the consequences of its own alleged misconduct in violating a criminal defendant's rights, CNN's own First Amendment rights need be forfeited.

public affairs can be made to depend "on the preliminary grace of judicial censors." 427 U.S. at 573.[8] Even if one assumed the most prejudicial of taped statements (hardly likely to be worse than the multiple-murder confessions at issue in *Nebraska Press* itself), neither court below explained why the traditional protective devices would not suffice, or why it was confident that the restraint would be effective. There was no need to view the tapes when it was plain that the standards in *Nebraska Press* could not be met in any event. The orders below, however well intentioned, cannot survive the three *Nebraska Press* inquiries, inquiries which the District Court and Court of Appeals in any event failed to make. Given this Court's recognition that even the briefest of delays can irreparably damage the constitutional rights of a free press, this itself provides a basis for a stay of the prior restraint against broadcast now in effect. *Nebraska Press Ass'n* v. *Stuart*, *supra*; *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

But a larger issue is posed. Fair trial rights are quite properly an abiding, daily concern of the federal and state judiciary. The "traditional" alternatives to prior restraints—prolonged voir dire, change of venue, sequestration of jurors, rigorous isolation procedures for prosecutors—can be cumbersome, time-consuming and expensive. In such circumstances there is a real risk that judges, precisely *because* of their dedication to protecting the trial rights of the criminal defendants before them, would be "predisposed to grant [a motion for a prior restraint], both to ease their task of ensur-

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8 Justice Brennan also made clear the risks inherent in having the Court engage in any sort of balancing of press vs. fair trial rights on a case-by-case basis, since in such situations, "judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights." 427 U.S. at 607. Fully aware of that risk, we nevertheless note how significant a role the press plays in the present case, where the extraordinary actions of the executive branch in General Noriega's capture, as well as the unusual concerns about the functioning of the judicial process in the wake of such executive action, make all the more desirable the most rigorous and autonomous journalistic scrutiny and commentary on the proceedings.

ing fair proceedings and to insulate their conduct in the criminal proceeding from reversal." *Nebraska Press*, *supra*, 427 U.S. at 608 (Brennan, J., concurring).[9]

Through the past decade, judicial efforts to protect the fair trial rights of criminal defendants have several times led to imposition of restraints that put the press and trial courts in unnecessarily confrontational roles. *See*, *e.g.*, *Goldblum*, *supra*; *In re C.B.S., Inc.*, *supra*. This has led to instances of the very complex and "interminable litigation" that Justice White feared.[10]

In the past, the courts of appeals have recognized the unacceptable nature of well-intentioned but unconstitutional efforts to limit the ability of the press to determine what to print. The failure of the Court of Appeals in this case to come to a similar recognition, and the increasing willingness of lower courts to grant prior restraints, present this Court with the opportunity to give effect to the lesson that can be

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9 Some sense of that unduly narrow focus is reflected in the Eleventh Circuit's reference (in a quotation dealing with access, *not* a prior restraint) to the District Court's obligation to protect a defendant's fair trial rights as the Court's "*primary responsibility*." App. 7a (emphasis added). The language of *Nebraska Press* is precisely to the contrary: there is to be no priority drawn between the First and Sixth Amendments. 427 U.S. at 561. In this, as in other respects, the Eleventh Circuit's repeated emphasis on cases involving access, not prior restraints, has a consistently distorting effect on its analysis, since this Court has distinguished between the press' right to publish what it obtains free of prior restraints and the balance to be struck when the press seeks governmental authorization for access to documents or proceedings. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring). The court below ignored this distinction.

10 As the Ninth Circuit (Kennedy, J.) observed with respect to the tangled litigation position that emerges from such confrontations:

> "A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt." *Goldblum*, *supra*, 584 F.2d at 907.

drawn from the "broader spectrum of cases," 427 U.S. at 571 (White, J., concurring), that have arisen in the years since *Nebraska Press* was decided. *Amici* urge the Court to grant review in order to assess the fidelity of the decision below to this Court's teachings in *Nebraska Press* and to consider adoption of a general rule prohibiting prior restraints in the fair trial/free press area.

CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari, the Petition should be granted.

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